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Confusing Punishment with Custodial Care: The Troublesome Legacy of *Estelle v. Gamble*

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CONFUSING PUNISHMENT WITH CUSTODIAL CARE: THE TROUBLESOME LEGACY OF *ESTELLE v. GAMBLE*

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INTRODUCTION

For the better part of two centuries, imprisonment has been the primary means of punishment for non-capital offenses in the United States. A person, once convicted, is turned over to an institution that will regulate every minute of her or his life. Yet, despite the central role that prisons have long played in our society, the use of the Constitution to regulate conditions of confinement in prisons is a relatively recent phenomenon. Certainly, part of this has to do with the fact that constitutional litigation did not begin in earnest until the "rediscovery" of the Civil War era civil rights statutes in *Monroe v. Pape*.[1] Still, *Monroe v. Pape* was decided in 1961, and it was not until 15 years later, in *Estelle v. Gamble*,[2] that the Eighth Amendment's prohibition of cruel and unusual punishment came to be used as a tool for improving prison conditions.

Today, with federal court dockets full of cases alleging that conditions of confinement violate the Eighth Amendment—particularly with respect to overcrowding—it is easy to forget that, prior to *Estelle*, the Eighth Amendment had been applied by the Court only to cases in which a mode of punishment, usually a method of execution, was at issue. *Estelle* thus redefined the constitutional concept of "punishment" by bringing the protections of the Cruel and Unusual Punishments Clause into the modern prison.

Despite the noble goals of *Estelle*, however, the decision is fundamentally flawed and has had a detrimental impact upon the very prisoners it was intended to protect. The problems stem from the Court's failure to take sufficient account of the realities of the modern prison. Imprisonment involves not only the fact and duration of confinement, but also the conditions under which that confinement occurs. Prisons are

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1. *See* Monroe v. Pape, 365 U.S. 167 (1961).

2. *See* Estelle v. Gamble, 429 U.S. 97 (1976).

literally miniature cities in which births, deaths, and even marriages occur. Prisons have their own governing structure, police force, industries, schools, medical facilities, housing complexes, and cemeteries.

Not all of these aspects of daily prison life fit comfortably within notions of "punishment." Indeed, much of the daily routine of prison life is virtually identical to that of other large, government-run, residential institutions such as mental health hospitals and foster care facilities, neither of which can be said to be in the business of "punishing" their residents. Rather, prisons perform two separate functions, one that is punitive and one that is custodial: prisons *punish* those they confine, and in this respect they are unique, but, like other residential facilities, prisons also *protect* and *care* for those within their custody. This article argues that the *Estelle* Court erred in failing to distinguish between these punitive and custodial functions and thereby merged two distinct constitutional concepts: the Eighth Amendment prohibition against cruel and unusual punishments, and the substantive due process duty of care and protection owed to those within government custody.

As a result of the blurring of the distinction between punishment and custodial care, the Court has struggled in the years since *Estelle* to develop Eighth Amendment standards that can govern all aspects of prison life. The Court's efforts have involved a tug-of-war between what the Court has termed "subjective" and "objective" factors.[3] The former term has been used to describe considerations that focus on the *intent* of the prison administrators, employees, and guards who engage in the conduct or impose the conditions complained of. The latter term has been used to describe factors that relate to the *impact* upon the prisoner of the conduct or conditions. While the pre-*Estelle* cases focused primarily upon issues of impact, the Court has, in recent years, shifted to a primarily intent-

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3. The use of the terms "subjective" and "objective" is somewhat misleading because of the way in which those terms are used in tort law. There, the terms distinguish between a focus upon the particular individual's motivations or actions under particular circumstances (subjectivity), and the idea of a more general standard based on notions of what the "reasonable person" should know or how such a person should act (objectivity).

In Farmer v. Brennan, 114 S. Ct. 1970 (1994), the Court explained that the "subjective" intent standard for prison cases is, in fact, subjective, in that the relevant inquiry is "what a defendant's mental attitude actually was (or is), rather than what it should have been (or should be)." *Id.* at 1980. However, it is unclear whether an "objective" factor is to be evaluated under a "reasonable prisoner" standard, or through an inquiry into the actual degree of suffering experienced by a particular prisoner or group of prisoners.

It is probably most useful to avoid use of these terms altogether, because the relevant distinction in Eighth Amendment cases is not so much between tort-law ideas of subjectivity and objectivity as between the intent of the punisher and the impact upon the punished. For this reason, this article will generally use the terms "intent-based" and "impact-based," rather than "subjective" and "objective."

based Eighth Amendment analysis. Considerations of intent are useful in determining when the custodial duty of care has been breached, but an intent-based analysis is ill-suited for determining what amounts to cruel and unusual punishment. The result of the attempt to fit all aspects of incarceration into an intent-based framework has been an unwieldy and unworkable set of contextual standards developed by an increasingly fragmented Court.[4]

This article concludes that the standard for determining when punishment is cruel and unusual should be impact-based, as it was in the years preceding *Estelle*. However, in order to develop such a standard, it is first necessary to untangle the strands of analysis in *Estelle* and to separate those aspects of imprisonment that are "punitive," and therefore subject to the Eighth Amendment, from those that are "custodial," and therefore more appropriately analyzed as aspects of the substantive due process duty of care. Those features which are unique to prisons and thus properly considered to be "punitive" are the *cell* (and the cellblock) and the *prison guard*, because it is the prisoner's relationship to these which defines the experience of incarceration. Other features of imprisonment are similar to those in other residential institutions and are, therefore, custodial.

This article's discussion will proceed as follows. Section I contains an historical review of the Court's early Eighth Amendment cases. Section II discusses the modern cases, focusing on those involving issues of double-celling: *Rhodes v. Chapman*[5] and *Wilson v. Seiter*.[6] Section III

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4. These standards can be summarized as follows:

1. Medical care:
   a. intent component: deliberate indifference;
   b. impact component: serious medical need.
2. Conditions:
   a. intent component: deliberate indifference;
   b. impact component: deprivation that amounts to a denial of a minimal civilized measure of life's necessities.
3. Excessive use of force, whether or not in the context of a prison disturbance:
   a. intent component: whether officials or employees acted maliciously and sadistically for the purpose of causing harm;
   b. impact component: none. If subjective standard has been met, Eighth Amendment has been violated, whether or not serious injuries have been suffered.

See Hudson v. McMillian, 503 U.S. 1, 5-9 (1992).

This conceptual framework is a bit of a muddle, as even the Court seems tacitly to have realized—no fewer than four opinions were written in the *Hudson* case. *See* Majority opinion of Justices O'Connor, Rehnquist, White, Kennedy and Souter, 503 U.S. at 4-12; *id.* at 12-13 (Stevens, J., concurring); *id.* at 13-17 (Blackmun, J., concurring); *id.* at 17-29 (Thomas, J., dissenting, joined by Scalia, J.).

5. Rhodes v. Champman, 452 U.S. 337 (1981).

6. Wilson v. Seiter, 501 U.S. 294 (1991).

discusses the inappropriateness of using an intent-based standard for determining when prison conditions are cruel and unusual. Section IV analyzes the *Estelle* decision. Finally, the concluding section proposes an alternative analysis, which distinguishes between punitive and custodial aspects of imprisonment.

I. THE EARLY EIGHTH AMENDMENT CASES

Prior to 1976, when *Estelle* was decided, the Supreme Court had interpreted the Eighth Amendment's prohibition against cruel and unusual punishments in four principal cases: *Wilkerson v. Utah*, decided in 1878;[7] *In re Kemmler*, in 1890;[8] *Weems v. United States*, in 1910;[9] and *Trop v. Dulles*, in 1958.[10] As will be shown below, in each of these cases the Court was concerned primarily with the way in which the punishment at issue was experienced by the prisoner.

In *Wilkerson*, the Court was asked to decide whether execution by shooting violated the Eighth Amendment.[11] The Court, in examining the history of the prohibition against cruel and unusual punishments, noted that prohibited punishments included those of torture "and all others in the same line of unnecessary cruelty."[12] The Court gave, as historical examples of prohibited punishments, those involving "circumstances of terror, pain, or disgrace."[13] Specifically, the Court alluded to punishments in which "the prisoner was drawn or dragged to the place of execution, in treason; or where he was embowelled alive, beheaded, and quartered, in high treason. Mention is also made of public dissection in murder, and burning alive in treason committed by a female."[14] The Court determined that death by shooting was not comparable to these extreme punishments and was, therefore, constitutional.[15]

In re Kemmler involved a challenge to the then-novel electric chair.[16] The prisoner claimed, in essence, that the novelty of this mode of execution, i.e., the unusual nature of the punishment, rendered it

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7. Wilkerson v. Utah, 99 U.S. 130 (1878).
8. *In re* Kemmler, 136 U.S. 436 (1890).
9. Weems v. United States, 217 U.S. 349 (1910).
10. Trop v. Dulles, 356 U.S. 86 (1958).
11. *See Wilkerson*, 99 U.S. at 134-35.
12. *Id.* at 136 (citations omitted).
13. *Id.* at 135.
14. *Id.*
15. *See id.* at 136.
16. *See In re* Kemmler, 136 U.S. 436, 441 (1890).

unconstitutional.[17] Again looking to the history of the Eighth Amendment, the Court cited examples of the extreme types of punishments that were prohibited—"burning at the stake, crucifixion, breaking on the wheel, or the like"—and determined that death by electrocution was not such a prohibited punishment.[18] The Court's reasoning is fascinating in light of current perceptions: the Court determined that the electric chair was developed as a more humane method of execution.[19] In language that would play a central role in later cases, the Court held that "[p]unishments are cruel when they involve *torture or a lingering death.*"[20] Because death in the electric chair was, on the contrary, "instantaneous and therefore *painless*," it was not cruel and satisfied constitutional requirements.[21]

Weems involved Eighth Amendment issues related to disproportionate sentencing.[22] A prisoner in the Philippines had been sentenced to 15 years in irons under hard and painful labor for falsifying public records.[23] As in earlier cases, the Court conducted an historical inquiry, and examined state court cases that had compared the relative barbarity and "odiousness" of various types of punishment.[24] The Court noted that interpretation of the cruel and unusual punishments clause might evolve over time: "The clause . . . may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[25] In striking down the sentence as excessive, the Court emphasized that punishment of "tormenting severity" is constitutionally impermissible.[26]

Finally, in *Trop* the Court dealt with the punishment of denationalization.[27] A military tribunal had, after a court martial, revoked the appellant's United States citizenship because the appellant had escaped

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17. *See id.*

18. *Id.* at 446.

19. *See id.* at 443. The development of the electric chair had resulted from a recommendation by the Governor of New York, that scientific advances be used to find a less barbarous manner of punishment than hanging, a product of the dark ages. *See id.* at 444.

20. *Id.* at 447 (emphasis added). The Court went on to say: "[T]he punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." *Id.*

21. *Id.* at 443 (emphasis added).

22. *See* Weems v. United States, 271 U.S. 349, 359 (1910).

23. *See id.* at 358, 364.

24. *See id.* at 377-78. Specifically, the Court discussed comparisons among whipping, quartering, hanging in chains, and castration. *See id.*

25. *Id.* at 378 (citing *Ex parte* Wilson, 114 U.S. 417, 427 (1885)); *see also* Mackin v. United States, 117 U.S. 348, 350 (1886).

26. *See Weems*, 217 U.S. at 381.

27. *See* Trop v. Dulles, 356 U.S. 86, 87 (1958).

from a stockade and gone AWOL for one day.[28] Tracing the history of the Cruel and Unusual Punishments Clause, the Court began by stating:

> The basic concept underlying the Eighth Amendment is nothing less than the dignity of [humanity]. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.[29]

The Court then examined denationalization in light of these principles, and found it to be a cruel and unusual form of punishment under the circumstances of the case.[30] In so doing, the Court focused entirely and explicitly on the *impact* of the punishment:

> There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. . . . It subjects the individual to a fate of ever-increasing fear and distress.[31]

Thus, whether discussing the "painlessness" of death by electrocution or the profound despair of being rendered stateless, the Court in each of the above cases focused its analysis upon the impact on the affected individual. In none of these cases was the intent of the state actor a relevant consideration.

The sole exception to this trend was *Louisiana ex rel. Francis v. Resweber*, a quirky 1947 case.[32] Even there, however, disagreements about the amount of actual suffering involved probably played a significant role in the outcome of the case. The facts of *Resweber* are uniquely gruesome. The defendant had been sentenced to death by electrocution.[33] He was put into the electric chair, the switch was pulled, but through some malfunction he did not die.[34] He was removed from the chair and waited through lengthy litigation to learn whether the state would be allowed to

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28. *See id.*
29. *Id.* at 100-01.
30. *See id.* at 103.
31. *Id.* at 101-02 (footnotes omitted).
32. Louisiana *ex. rel.* Francis v. Resweber, 329 U.S. 459 (1947).
33. *See id.* at 460.
34. *See id.*

try a second time to execute him.[35] By a 4-1-4 vote, the Supreme Court held that a second attempt would not amount to cruel and unusual punishment and allowed the execution to proceed.[36]

A close reading of Justice Reed's opinion, which became the Opinion of the Court by virtue of the Frankfurter concurrence, in conjunction with the dissenting opinion of Justice Burton, reveals important disagreements about the grisly factual question of how much electricity had actually passed through the defendant's body.[37] As with the other early Eighth Amendment cases, then, a central issue in *Resweber* was the degree of suffering experienced by the prisoner.

Justice Frankfurter's concurring opinion, which provided the crucial fifth vote for execution, is most often quoted when this case is discussed. In contrast to the majority's approach, Justice Frankfurter plainly advanced an intent-based standard, focusing on the accidental, unintentional nature of the failure of the first attempt.[38]

Thus, in the early cases involving modes of punishment, and with the exception of Justice Frankfurter's concurrence in *Resweber*, the Court looked primarily at the way in which the punishment at issue was experienced by the prisoner to determine whether the punishment was

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35. *See id.* at 461.

36. *See id.* at 466.

37. The State had alleged that no electrical current had reached his body, that his flesh did not show any signs of electrical burns, and that the electric current had "tickled him." *See id.* at 480-81 n.2. The Reed opinion apparently accepted this representation in concluding:

> The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in a cell block. We cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as denial of due process because of cruelty.

Id. at 464. The four Justices found no constitutional violation, apparently concluding that the defendant's degree of actual suffering had not been excessive because only a minimal electrical current was used, such that the harm to the defendant was merely psychological (i.e., the anxiety of awaiting a second attempt at execution). *See id.*

It was with this factual analysis of suffering that the dissenting Justices took issue. The defendant's pleadings had painted a much different picture: "Then the electrocutioner turned on the switch and when he did Willie Francis' lips puffed out and he groaned and jumped so that the chair came off the floor. Apparently the switch was turned on twice and then the condemned man yelled: 'Take it off. Let me breath [sic].'" *Id.* at 480 n.2.

The dissenting Justices explicitly rejected the notion that intent of the administration was the relevant consideration: "Lack of intent that the first application be less than fatal is not material. The intent of the executioner cannot lessen the torture or excuse the result." *Id.* at 477. The dissenters compared the experience of repeated attempts at electrocution to that of being burned at the stake. *See id.* at 476. In light of this factual dispute about the amount of electricity that had passed through the defendant's body and the degree to which he had suffered, the dissenters urged that the case be remanded for a determination of the issue. *See id.* at 480-81.

38. *See id.* at 466-72 (Frankfurter, J., concurring).

cruel and unusual. In contrast, in the more recent cases involving conditions of imprisonment, the Court's Eighth Amendment analysis has become almost entirely intent-based. This shift in the Court's analysis is discussed in the following section.

II. THE MODERN CASES

The evolution in the Court's approach to Eighth Amendment conditions cases is best understood by examining two cases dealing with double-celling of prisoners: *Rhodes v. Chapman* and *Wilson v. Seiter*.[39]

In *Rhodes*, the Court used a primarily impact-based test to determine whether the double-celling of prisoners violated the Eighth Amendment.[40] The Court's opinion centered on the degree of discomfort caused by double-celling and characterized earlier cases as teaching that the Eighth Amendment is violated when prisoners are deprived of "the minimal civilized measure of life's necessities."[41] In applying this principle, Justice Powell rejected the plaintiffs' argument that the expert opinions and studies introduced at trial provided the relevant Eighth Amendment "standards of decency."[42] Terming the opinions and studies merely "goals" suggested by the individuals and organizations offering them, rather than "constitutional minima," Justice Powell concluded that "generalized opinions of experts cannot weigh as heavily in determining contemporary

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39. Rhodes v. Chapman, 452 U.S. 337 (1981); Wilson v. Seiter, 501 U.S. 294 (1991).

The Court had addressed the application of the Eighth Amendment to specific conditions of confinement in an earlier case, Hutto v. Finney, 437 U.S. 678 (1978). *Hutto* was merely the concluding episode of a long series of skirmishes in the lower courts. *See id.* at 681 n.2. The litigation had involved broad challenges to a number of conditions in the Arkansas state prison system, including punitive segregation. *See id.* at 682. In punitive segregation, anywhere from four to eleven prisoners were confined to single cells measuring eight feet by ten feet, with no furniture and a toilet that was controlled from outside the cell. *See id.* Mattresses were thrown randomly on the floor at night, and were not disinfected after use. *See id.* Prisoners so confined existed on a diet of "grue," a baked mixture of various ingredients providing only 1,000 calories per day. *See id.* at 683. Prisoners were sometimes confined to punitive segregation for months. *See id.* at 684. The district court had limited the number of prisoners who could be confined to a cell, ordered an end to the "grue" diet, and imposed a 30 day maximum on the duration of punitive confinement. *See id.* at 684. By the time the case reached the Court, only the 30 day limit was at issue. *See id.* at 680.

Writing for the Court, Justice Stevens stated that, in evaluating conditions of confinement under the Eighth Amendment, the conditions must be taken as a whole, rather than looked at individually. *See id.* at 687. Whether the conditions were cruel and unusual depended upon the nature of the conditions and their duration. Noting that a 30 day maximum would not be constitutionally required in every case, Justice Stevens stated: "A filthy, overcrowded cell and a diet of 'grue' might be tolerable for a few days and intolerably cruel for weeks or months." *Id.* at 686-87.

40. *See Rhodes*, 452 U.S. at 348.

41. *Id.* at 347.

42. *See id.* at 347.

standards of decency as 'the public attitude toward a given sanction.'"[43] Justice Powell concluded that the hardships caused by double-celling did not violate these standards.[44]

While agreeing that the relevant Eighth Amendment standard was one that focused on the impact upon the prisoner, Justice Brennan (in concurrence), and Justice Marshall (in dissent) adopted approaches different from that of Justice Powell. Justice Brennan suggested that a court must look at the "totality of the circumstances," adding, "[e]ven if no single condition of confinement would be unconstitutional in itself, 'exposure to the cumulative effect of prison conditions may subject inmates to cruel and unusual punishment.'"[45] Applying this test, Justice Brennan concluded that the prison at issue was "one of the better, more humane large prisons in the nation," and therefore concurred in the judgment that the conditions were not unconstitutional.[46]

Justice Marshall would instead have relied upon the expert testimony and studies presented at trial indicating that long-term prisoners must each have at least 50 square feet of cell floor space to avoid serious mental, emotional, and physical deterioration.[47] Because the double-celled inmates had far less cell floor space than required under these standards, Justice Marshall would have found that the Eighth Amendment had been violated.[48]

The Court revisited the issue of double-celling 10 years later in *Wilson v. Seiter*.[49] To decide that case, the Court developed a primarily

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43. *Id.* at 348-49 n.13.

44. *See id.*

45. *Id.* at 362-63 (quoting Laaman v. Helgemoe, 437 F. Supp. 269, 322-23 (D.N.H. 1977)). According to Justice Brennan, the Court must determine whether "the cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration." *Id.* at 364 (quoting *Laaman*, 437 F. Supp. at 323) (internal quotation marks omitted).

46. *Id.* at 366-67.

47. *See id.* at 371 n.4. Reports cited at trial included: AM. PUB. HEALTH ASS'N, STANDARD FOR HEALTH SERVICES IN CORRECTIONAL INSTITUTIONS (1976); COMM'N ON ACCREDITATION FOR CORRECTIONS, MANUAL OF STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS (1977); NAT'L INST. OF JUSTICE, AMERICAN PRISONS AND JAILS (1980); NAT'L SHERIFFS' ASS'N, A HANDBOOK ON JAIL ARCHITECTURE (1975); U.S. DEP'T OF JUSTICE, FEDERAL STANDARDS FOR PRISONS AND JAILS (1980); NAT'L COUNCIL ON CRIME AND DELINQUENCY, MODEL ACT FOR THE PROTECTION OF RIGHTS OF PRISONERS (1972).

48. *See Rhodes*, 452 U.S. at 374-75.

49. Wilson v. Seiter, 501 U.S. 294 (1991). Like *Rhodes*, *Wilson* involved a challenge to overall conditions of confinement. *See Wilson*, 501 U.S. at 296. The conditions at issue in *Wilson* were, in addition to double-celling, the following: "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate rest rooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates." *See id.*

intent-based analysis, and, in so doing, abandoned the approach of *Rhodes*. Although the Court held that the Eighth Amendment included both intent-based ("subjective") and impact-based ("objective") components, the Court's analysis focused on whether the conditions of confinement at issue were imposed with punitive intent.[50] The Court reasoned that, when the conditions at issue are not part of the actual punishment "meted out . . . by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it [the condition] can qualify [as punishment]."[51] A showing of punitive intent is, therefore, necessary to make conditions of confinement amount to "punishment."[52]

While acknowledging that the "holding in *Rhodes* turned on the objective component of an Eighth Amendment prison claim (Was the deprivation sufficiently serious?)," Justice Scalia concluded that the *Rhodes* Court simply *did not reach* the issue of intent, because that component was not necessary to the Court's holding.[53] Justice Scalia's statements to the

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50. *See id.* at 300.

51. *Id.* The Court had used similar reasoning in Bell v. Wolfish, 441 U.S. 520 (1979), a case involving conditions of pre-trial detention, including double-celling. Reasoning that the Eighth Amendment applies only to persons who have been convicted of crimes, because only they may legally be punished, the Court concluded that the Eighth Amendment is inapplicable to pre-trial detainees. *See id.* at 535 n.16.

In order to establish a substantive due process violation a detainee must show that the condition at issue *amounts to punishment*. *See id.* at 538. This requires proof that the jailer *intended* to punish the detainee. *See id.* Such intent may be established explicitly through the government's expressed intent to punish or may be inferred from conditions that are not "reasonably related to a legitimate governmental objective" and are therefore "arbitrary or purposeless." *See id.* at 539.

52. It remained for the Court to determine what degree of intent had to be proven. While the Court in *Estelle* had adopted a standard of "deliberate indifference" for cases involving denial of medical care, *see infra* notes 79—85 and accompanying text, in a later case, Whitley v. Albers, 475 U.S. 312 (1986), involving allegations of excessive force, the Court had articulated a higher standard.

In *Whitley*, the plaintiff had sustained serious permanent injuries when he was shot in the knee by a guard in the aftermath of a prison disturbance. *See id.* at 316. Justice O'Connor, writing for the Court, concluded that *Estelle's* recklessness standard of "deliberate indifference" was inappropriate to the crisis situation of a prison disturbance and instead adopted a standard of specific intent: "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id.* at 320-21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied sub nom.* John v. Johnson, 414 U.S. 1033 (1973)) (internal quotation marks omitted).

In *Wilson*, Justice Scalia concluded that the appropriate level of intent for cases in which conditions are challenged is the "deliberate indifference" standard of *Estelle*, rather than the higher *Whitley* standard. *See Wilson*, 501 U.S. at 302-03.

53. *Wilson*, 501 U.S. at 298. This conclusion appears disingenuous, however, given that nothing was said about an intent component in any of the opinions in *Rhodes*. One assumes that, in deciding *Rhodes*, the Supreme Court would have articulated the entire legal standard before applying it to the facts before it. In other words, if the *Rhodes* Court had believed that there was an intent component to an Eighth Amendment claim, it is likely that the Court, or one of the concurring or dissenting Justices, would have said *something* about that component, even to the extent of acknowledging that it was not at issue in the case before it.

contrary notwithstanding, this imposition of an intent requirement marked a significant departure from *Rhodes*.

A final gloss on this emerging, intent-based analysis was applied in *Hudson v. McMillian*, a case involving a prisoner's allegation that he had been beaten by guards.[54] Justice O'Connor's opinion for the Court essentially eliminated the impact-based component altogether for allegations of excessive force. Justice O'Connor first held that the applicable intent standard in such cases is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[55] Justice O'Connor then concluded that societal standards of decency—and therefore the Eighth Amendment prohibition on cruel and unusual punishments—are violated whenever prison guards have applied force with sadistic or malicious intent, regardless of whether the guards' actions have caused serious injury to the prisoners.[56]

In addition to setting out intent requirements for prison conditions cases, the Court in *Wilson* modified the requirements concerning impact upon the prisoner. *See id.* at 304. Justice Scalia rejected the "totality of circumstances" standard urged by Justice Brennan in his concurring opinion in *Rhodes* and held that whenever prison conditions are challenged, at least one of the conditions must, *by itself*, amount to a deprivation of a basic life necessity. *See id.* Conditions which alone are insufficient to satisfy the objective test cannot be aggregated, except in very rare situations in which the conditions at issue were "mutually reinforcing." *See id.* Examples of conditions that may be aggregated are a lack of heat combined with a shortage of blankets, or lack of opportunity for exercise combined with small cell size. *See id.* at 304-05.

54. *See* Hudson v. McMillian, 503 U.S. 1, 4 (1992).

55. *Id.* at 6 (quoting Whitley v. Albers, 475 U.S. 312, 320-21 (1986)) (internal quotation marks omitted). Despite the absence of the dangerous and fluid prison uprising present in *Whitley*, Justice O'Connor concluded that a situation necessitating the use of force requires a similar degree of hasty judgment, and that the heightened specific intent standard is therefore appropriate. *See id.* at 6-7. The Court divided 5-4 on this issue. Justice Stevens and Justice Blackmun wrote opinions concurring in the majority's holding with respect to the impact component, but dissenting from the holding with respect to the intent component. *See id.* 12-17. Justice Thomas, joined by Justice Scalia, wrote an opinion dissenting on both issues. *See id.* at 17-29.

56. *See id.* at 6-7. Justice O'Connor's approach differed from that of previous cases. Whereas previous decisions had focused upon "contemporary standards of decency" only in the context of assessing the impact-based aspects of a prisoner's claim, i.e., the injuries or conditions complained of, Justice O'Connor held that the conduct or intent of prison employees may also violate societal standards. *See id.* at 9.

Applying this analysis, Justice O'Connor went on to rationalize previous decisions in light of this contextual approach. *See id.* at 7-10. With respect to prison conditions, "society" believes that "routine discomfort is part of the penalty that criminal offenders [must] pay." *Id.* at 9 (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)) (internal quotation marks omitted). Accordingly, only deprivations that deny prisoners a minimal civilized measure of life's necessities are actionable. *See Hudson*, 503 U.S. at 9. Similarly, with respect to medical care, "society" does not expect prisoners to have "unqualified access;" their unmet needs must be "serious" to be actionable under the Eighth Amendment. *See id.*

The *Hudson* case marked the Court's complete break with the older Eighth Amendment cases. Prior to *Wilson* and *Hudson*, the Court had been concerned with the prisoners' experiences of punishment. After *Wilson* and *Hudson*, impact-based considerations are, *at most*, of secondary importance. That the intent-based factors are currently the more important is shown vividly by the fact that, after *Hudson*, intent alone may give rise to an Eighth Amendment violation, while even the most dreadful conditions are apparently not sufficient unless accompanied by the requisite intent.

As discussed in the following section, the Court's move to an intent-based standard is entirely inappropriate to Eighth Amendment cases involving prison conditions. In addition, the theoretical premise underlying this shift—that an "intent to punish" is required because prison conditions are not part of the "punishment" formally imposed upon a prisoner—is mistaken.

III. PROBLEMS INHERENT IN INTENT-BASED STANDARDS

The Court's shift to an analysis which focuses on the motivations of correctional actors in prison condition cases is problematic in at least three respects: first, the theoretical premise upon which the imposition of an intent requirement is based is wrong; second, an intent-based standard is unworkable in cases involving challenges to conditions of confinement; and, third, the use of an intent-based standard is inherently weighted against prisoners.

With respect to the theoretical justification underlying the imposition of an intent-based standard, the Court's analysis in *Wilson* was based on a perceived distinction between sanctions that are imposed as "punishment" by the sentencing court or by statute, and conditions of imprisonment which, according to the Court, are not formally imposed as punishment. This distinction is, however, artificial and historically invalid. Imprisonment has been the dominant mode of punishment in the United States for almost 200 years,[57] so it would be difficult to argue seriously that incarceration is not "punishment." Nonetheless, Justice Scalia, writing for the Court in *Wilson*, and Justice Thomas, writing in dissent in *Hudson*, asserted that the *substance* of imprisonment, i.e., the

57. *See* HENRY ELMER BARNES, THE STORY OF PUNISHMENT 120-44 (2d ed. 1972). Barnes traces the origin of the penitentiary in the United States to the conversion of the Walnut Street Jail in Philadelphia between 1790 and 1794, and the erection of the Newgate Prison in New York City between 1796 and 1797. *See id.* at 129-33. Prisons came into use in other states during the first half of the nineteenth century. *See id.* at 138-39.

details that form the day-to-day reality of prison life, are not "punishment" because neither criminal statutes nor sentencing courts have explicitly imposed these conditions of confinement.

The reasoning of Justices Scalia and Thomas appears to depend on a distinction between sanctions imposed by the judicial or legislative branch and conditions imposed by the executive branch through the administrative agencies charged with running the nation's prisons. There is certainly a clear division of responsibility among these branches. The legislatures set the sentences that can be imposed for enumerated crimes and allocate the money for building and maintaining prisons. The courts, in turn, determine what sentence, within the legislatively permissible range, will be imposed in a given case. The legislatures and courts therefore determine *who* will be imprisoned and *for how long*. However, administrative agencies design and locate the prisons, develop the classification and disciplinary schemes, and assign the prisoners to particular prisons. In short, it is the agencies that determine *where* the prisoners will spend their time and *what* will happen to them while they are incarcerated.

Thus, the Scalia/Thomas analysis amounts to the conclusion that the government "punishes" prisoners when it determines the fact or duration of imprisonment, but not when it establishes the *conditions* of that confinement. There is no apparent jurisprudential basis for making the definition of "punishment" depend on whether the action at issue is legislative or judicial, on the one hand, or administrative, on the other. The government's carrying out of "punishment" surely extends beyond the moment of sentencing, regardless of the fact that it is an administrative agency that is exercising power over the prisoner.

Moreover, this supposed distinction ignores the reality of correctional policy in the United States. Legislatures and courts envision a certain package of disabilities when they enact criminal statutes or impose sentences. As the Court itself has recognized, the legislators and judges, acting as the voice of the people who have selected them, have certain negative expectations about prison: they want and expect prison to be an unpleasant place.[58] In the eyes of the legislators, judges, and the public, punishment is more than the simple deprivation of liberty; our society thinks of "imprisonment" as a bundle of punitive "things." We expect

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58. As Justice Powell noted in *Rhodes*,

> To the extent that such [prison] conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society. . . . [T]he Constitution does not mandate comfortable prisons, and prisons . . . which house persons convicted of serious crimes cannot be free of discomfort.

Rhodes, 452 U.S. at 347, 349.

that there will be different sorts of prisons with the "worst" offenders being assigned to the harshest penological environments. We expect that there will be solitary confinement for those who commit disciplinary infractions, and we probably also expect that prisons will be ruled by fear and intimidation. Government-imposed punishment therefore encompasses more than the mere fact or duration of confinement; it involves the *quality* of that confinement as well.

In short, the fact that an administrative agency, rather than the legislature or the judiciary, carries out the function of imposing a certain set of conditions upon the offender is irrelevant to the question of whether those conditions amount to "punishment." The reality is that, within any jurisdiction, there is a single government system of "punishment," the responsibility for which is divided among the three branches of government. This division of responsibility among the three branches cannot plausibly be the basis for defining what constitutes "punishment" under the Eighth Amendment.[59] However, this is precisely the distinction upon which the Court's analysis in *Wilson* depends and, as such, the *Wilson* analysis is unsound.[60]

The second problem with the use of an intent-based standard in Eighth Amendment cases involving conditions of confinement is that such a test does not work in these cases. Because of the difficulty of assessing intent in cases challenging system-wide prison conditions, an intent-based standard fails in the very cases that are most often litigated under the Eighth Amendment. Justice White made this point in his concurring opinion in *Wilson*:

> Not only is the majority's intent requirement a departure from precedent, it likely will prove impossible to apply in many cases. Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison,

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59. For a further discussion of the shared responsibility for imposing punishment among the three branches of government, see Thomas K. Landry, *Punishment and the Eighth Amendment*, 57 OHIO ST. L.J. at 45-54 (forthcoming 1996).

60. Justice Scalia's analysis fares no better from an historical perspective. The distinction that Justice Scalia suggests—that conditions of confinement cannot amount to punishment in the absence of a showing of intent to punish—has no basis in precedent. As discussed in Section I, *supra*, the Court's older cases involving modes of punishment focused on the impact of the punishment upon the offender, without any suggestion that intent to punish was a relevant consideration. Even the cases upon which Justice Scalia purported to rely—*Resweber* and *Estelle*—fail to support his approach. Neither of these cases attempted to define "punishment," let alone suggest a distinction based upon intent to punish. In particular in *Estelle*, Justice Marshall appeared to take as a given that medical care is an aspect of "punishment" regardless of the intent of the prison administration, and despite the fact that specific medical care requirements are not "meted out" by the sentencing courts or the legislatures. *See* Estelle v. Gamble, 429 U.S. 97, 102-04 (1976).

> sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined, and the majority offers no real guidance on this issue. In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system.
>
> The majority's approach also is unwise. It leaves open the possibility, for example, that prison officials will be able to defeat a § 1983 action challenging inhumane prison conditions simply by showing that the conditions are caused by insufficient funding from the state legislature rather than by any deliberate indifference on the part of the prison officials.[61]

The intent-driven model therefore does not fit the factual context of most Eighth Amendment cases.

In addition, an intent-based standard fails to reach some of the most important issues that may arise in a prison setting. Except in those extreme situations involving sadistic behavior on the part of prison guards, the most serious problems in prison probably have relatively little to do with the intent of the prison officials. Rather, it is the conditions themselves that are of concern. Intolerable conditions are made no less so by a lack of actionable intent on the part of prison officials. As Justice Stevens has observed in other contexts, the use of dungeons, chains, and shackles might satisfy an intent-based test if prison officials could simply offer a good-faith justification based on the need to maintain security with fewer prison guards,[62] and the use of bullwhips might similarly be justified by arguing that it improves prison discipline.[63] A standard focusing primarily on the motivations of the prison administration may, therefore, fail to remedy even those conditions widely viewed as intolerable.

Beyond these criticisms, however, the final and, perhaps, most fundamental problem with the Court's approach is that a primarily intent-based standard can never be an adequate or accurate measure of the nature of the punishment at issue. This is so because an intent-based standard is inherently weighted against prisoners. While an impact-based standard

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61. Wilson v. Seiter, 501 U.S. 294, 310-11 (1991) (footnotes omitted). Justice Blackmun registered similar objections in his concurring opinion in *Farmer*. *See* Farmer v. Brennan, 114 S. Ct. 1970, 1986 (1994).

For similar observations and criticisms, see Ruthanne DeWolfe, *The View from Inside the Heads of Correctional Officials: The Legacy of Resweber*, CLEARINGHOUSE REV. 1007, 1007-18 (Jan. 1993).

62. *See* Bell v. Wolfish, 441 U.S. 520, 587-88 (1979) (Stevens, J., dissenting). *Bell* involved conditions of pre-trial detention. *See id.* at 530. It was decided as a substantive due process case under the Fifth Amendment, rather than the Eighth Amendment. *See id.*

63. *See* Turner v. Safley, 482 U.S. 78, 101 (1987) (Stevens, J., concurring in part and dissenting in part).

sees prison conditions through the eyes of the prisoner, an intent-based standard sees these same conditions through the eyes of the prison administration and guards. Framing the inquiry from the vantage point of the prison administration and guards makes it unlikely that claims of prisoners about conditions of confinement can ever be fairly considered.

To understand why this is so, it is necessary to consider the practicalities of prison litigation. Representation of prisoners is exceedingly difficult because prisoners are, by definition, probably the most despised client population. Prisoners are the "other": they are condemned; sent to remote rural locations; hidden from view; and forgotten. Indeed, if we are honest about what "society" really thinks of prisoners, it is likely that a significant portion of society is indifferent or actively opposed to prisoners and willing to write them off entirely.

The situation is further complicated by the marked disparity between the racial, ethnic, and economic makeup of prisoner populations and that of the "society" that is responsible for trying and deciding prison cases.[64] In these demographic respects the lawyers, judges, and jurors involved in prison cases will generally resemble the other "society" involved in Eighth Amendment litigation: that of prison administrators and guards.[65] Given this disparity, for a lawyer representing a prisoner there is an initial challenge in simply getting the other actors in the legal system to care enough about the client to entertain the possibility that important rights have been violated. To an extent unknown in other contexts, a case involving the rights of a prisoner requires both judge and jury to overcome their sense of the prisoner's "otherness" before the prisoner's claims can be fairly considered.

Where the Eighth Amendment standard focuses upon the experience of the imprisoned, there is at least a chance that the prisoner's claims may be fairly considered. Focusing on the impact upon the prisoner of prison

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64. Prisons are disproportionately populated by people of color. In 1990, Blacks and Hispanics constituted almost 60 percent of the United States prison population. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES 1990, Table 3, "Number of Inmates/residents in State and Federal correctional facilities by race, Hispanic origin, jurisdiction and region, June 29, 1990" (1990). Out of a total federal and state prison population of 715,649, 331,880 of the prisoners were Black non-Hispanic and 95,498 were Hispanic. *See id.* 274,929 of the prisoners—39 percent—were White non-Hispanic. *See id.* There were also 6,471 prisoners of American Indian or Alaska Native origin and 6,871 of Asian or Pacific Islander origin. *See id.*

65. In contrast to the demographic statistics for prisoner populations cited in the preceding note, almost three-fourths of the correctional employees were White. *See id.*, Table 23, "Total payroll staff in State and Federal correctional facilities, by sex and race/Hispanic origin, June 29, 1990." Of 253,397 total payroll staff, 187,093 were White non-Hispanic, 49,226 were Black non-Hispanic, 13,148 were Hispanic, and 3,930 were of other backgrounds. *See id.*

conditions and guard conduct forces a judge or juror to attempt to empathize with the prisoner, i.e., to see the prison through the prisoner's eyes. With an impact-based test, judge and juror can be made to think: "How would it be for *me* to live in conditions like that? Those conditions are appalling." If the judge and juror can feel the prison as lived by the prisoner, there is some chance that intolerable conditions or conduct will be found to be cruel and unusual.

In contrast, an intent-based test reinforces what judge and juror are naturally inclined to do anyway: identify with the prison employees (who are like them) and see the prison through their eyes. Judge and juror are likely to think: "That could be me in that job. It's hard, and the administration and guards are doing the best they can." When prison is viewed in this context—as a scary, chaotic place inhabited by sinister and violent "others," underfunded and understaffed—even the worst conditions and conduct are unlikely to be found cruel and unusual.

Put another way, both the intent-based and impact-based tests are designed to put the fact-finder in another person's shoes; the crucial difference is *whose*. An intent-based test, which internalizes the perspective of the prison employees, cannot possibly be expected to measure whether conditions and conduct violate constitutional requirements. Only an impact-based test, which situates the factfinder with the prisoner, can meet this challenge.

The Court has gone seriously astray in imposing an intent-based requirement in Eighth Amendment cases involving conditions of confinement. To understand why this shift has occurred, it is necessary to examine *Estelle v. Gamble*,[66] the case in which the intent-based standard of "deliberate indifference" was introduced. *Estelle* is the bridge between the Court's older cases involving modes of punishment and the more recent cases involving conditions of confinement. As will be seen in the following section, in *Estelle* the Court confused and merged two distinct strands of precedent; it is this confusion that has led to the present-day reliance upon considerations of intent. An untangling of this analysis is required if sound and workable standards for evaluating prison conditions are to be developed.

66. Estelle v. Gamble, 429 U.S. 97 (1976).

IV. A RE-EXAMINATION OF *ESTELLE V. GAMBLE*

The Court's application of the Eighth Amendment to prison conditions began in 1976, with *Estelle v. Gamble*.[67] *Estelle* involved a prisoner's complaint that the prison had failed to provide him with adequate medical care after he sustained a back injury.[68] The prisoner's *pro se* complaint had been dismissed by the district court.[69] Apparently, the district court had thought it so clear that an allegation of inadequate medical care did not state a cause of action under the Eighth Amendment that the court had not even notified the defendants of the complaint, let alone required them to submit responsive pleadings.[70] The court of appeals reversed and reinstated the complaint; the Supreme Court thereafter granted the defendants' certiorari petition.[71] Justice Marshall, writing for the Court, held that a denial of medical care amounts to cruel and unusual punishment where the prison medical staff, guards, or other prison employees have acted with deliberate indifference to the prisoner's serious medical needs.[72]

Justice Marshall articulated the standard that, for 20 years, has remained the means for determining whether inadequate medical care amounts to cruel and unusual punishment. *Estelle's* historical significance, however, is that it established the principle that prison *conditions* can amount to cruel and unusual punishment. This conclusion, which is taken as a given today, was reached through an ingenious analytical route.

Justice Marshall's majority opinion reviewed the Court's prior cases interpreting the Eighth Amendment and concluded that the Eighth Amendment had historically barred inhuman techniques of punishment or punishment which causes unnecessary suffering.[73] Justice Marshall focused particularly on the 1890 case of *In re Kemmler*, in which the Court concluded that "[p]unishments are cruel when they involve torture

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67. *Id.*

68. *See id.* at 98.

69. *See id.* at 99.

70. *See id.* at 98 n.2.

71. *See id.* at 98.

72. *See id.* at 104. Justice Marshall noted: "This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Id.* at 104-05 (notes omitted). On the facts presented, however, the prisoner's complaint failed to show that the medical staff had been more than negligent; the complaint therefore failed to state a cause of action under the Eighth Amendment against the medical staff. *See id.* at 107-08. The Court remanded the case to the court of appeals with respect to the claims against the prison administration. *See id.* at 108.

73. *See id.* at 102-03.

or lingering death."[74] Thus, Justice Marshall, in analyzing the requirements of the Eighth Amendment, found that prior cases had been decided primarily on the basis of *impact-based* considerations, particularly the extent of pain and suffering experienced by the prisoner.[75] Justice Marshall then articulated the crucial link between the older cases and the case before him: "In the worst cases a failure to treat a prisoner's medical needs may actually produce physical 'torture or a lingering death,' . . . the evils of most immediate concern to the drafters of the Amendment."[76] Justice Marshall's analysis, therefore, rested upon a simple but powerful idea: for a prisoner, a denial of medical care may *feel* like torture or lingering death.[77] The metaphor at the heart of Justice Marshall's analysis—lack of medical care as torture or lingering death—is purely impact-based.[78] Denial of medical care is the equivalent of more traditional forms of cruel and unusual punishment, because of the similar impact upon the prisoner. The metaphor is, therefore, the theoretical basis for bringing *all* prison conditions within the scope of the Eighth Amendment: if the conditions are serious enough to be experienced in the same way as traditionally prohibited forms of punishment, the conditions are cruel and unusual.

However, having meticulously and persuasively laid out an impact-based theory for determining that a denial of medical care may amount to cruel and unusual punishment, Justice Marshall paradoxically used an *intent-based* standard—deliberate indifference—to decide the case.[79] Justice Marshall examined the facts of the case entirely in terms of intent, focusing upon the attempts of the medical staff to treat the prisoner and concluding that the medical staff had been, at worst, negligent.[80] Had Justice Marshall pursued his impact-based analysis, he would instead have concentrated upon the severity of the prisoner's pain to determine whether the prisoner had experienced the equivalent of "torture or lingering death."

The *Estelle* opinion suffers from a fundamental inconsistency in its internal reasoning. In order to bring the denial of medical care within the reach of the Eighth Amendment's prohibition against cruel and unusual punishments, and to find a link with precedent, the Court employed an

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74. *In re* Kemmler, 136 U.S. 436, 447 (1980).

75. *See Estelle*, 429 U.S. at 102.

76. *Id.* at 103 (citing *In re* Kemmler, 136 U.S. at 447).

77. *See id.* at 103.

78. *See id.*

79. *See id.* at 104.

80. *See id.* at 107. As indicated earlier, the Court remanded the case for a determination of the culpability of the prison officials. *See supra* note 72.

impact-based metaphor: lack of medical care as torture or lingering death.[81] The experience of being denied medical care *feels to the prisoner* like, and is therefore equivalent to, "torture or lingering death," which the earlier cases had found to constitute cruel and unusual punishment. However, the Court then turned around and decided the case under an intent-based standard: deliberate indifference to serious medical needs.[82]

The source of the tension in the Court's analysis between considerations of impact and intent can be found in a seemingly unremarkable portion of the *Estelle* opinion. In addition to holding that a denial of medical care may amount to cruel and unusual punishment, Justice Marshall discussed a prison's duty to provide medical care to prisoners.[83] In locating that duty, Justice Marshall relied on what he termed the "common-law view" that "it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself."[84] In other words, once the government takes an individual into custody, the government assumes a duty to provide the individual with those necessities which the individual, because of incarceration, is otherwise unable to obtain. Justice Marshall concluded that this duty to keep a prisoner free from harm includes a responsibility to provide for the prisoner's medical needs.[85]

This part of the Court's opinion initially appears unexceptional; even in 1976, the proposition that prisons were responsible for providing some degree of medical care was widely accepted.[86] But there is a hidden problem: the duty of care derives not from the state's power to *punish*, but rather from the state's power to *take into custody*. The prison's duty to care for its prisoners is, therefore, grounded in notions of substantive due process, rather than in the Eighth Amendment. This distinction has tremendous significance because two entirely different historical strands of analysis are involved.[87]

The duty of care derived from the state's power to take into custody has a history which is different from, yet parallel to, that of Eighth Amendment jurisprudence. The principle that the government has a duty to care for prisoners is one of long-standing, dating back at least to the

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81. *See id.* at 103.

82. *See id.* at 103-04.

83. *See id.*

84. *Id.* (quoting Spicer v. Williamson, 132 S.E. 291, 293 (1926)) (internal quotation marks omitted).

85. *See id.* at 104-05.

86. *See id.* at 104-05 nn.10-12 (listing cases involving findings of inadequate medical care).

87. With respect to punishment, the older cases interpreting and applying the Eighth Amendment are discussed in Section I, *supra*.

1892 case of *Logan v. United States*.[88] Significantly, in *Logan* the duty was framed, not in terms of the state's *punitive* powers, but rather in terms of its *custodial* powers:

> The United States, having the absolute right to *hold* such prisoners, have an equal duty to protect them, while so *held*, against assault or injury from any quarter. The existence of that duty on the part of the government necessarily implies a corresponding right of the prisoners to be so protected; and this right of the prisoners is a right secured to them by the Constitution and laws of the United States.[89]

This duty of care arises, then, from the government's custodial relationship to its prisoners, and is grounded in principles of substantive due process. Unlike the Eighth Amendment prohibition against cruel and unusual punishments, the custodial duty of care extends beyond incarceration to other custodial contexts such as mental hospitals[90] and, perhaps, residential foster care facilities and foster homes.[91]

The Court's most recent, extensive discussion of the duty of care occurred in *DeShaney v. Winnebago County Department of Social Services*.[92] There, a suit was brought on behalf of a child who had been seriously abused by his father.[93] The suit alleged that, because the state child welfare officials had known of the abuse but had failed to protect the child, the state had violated the child's substantive due process rights.[94] In rejecting the claim, the Court held that the state had owed the child no constitutional duty because the child had not been in the state's custody.[95] The Court explained that such a duty to protect an individual from harm

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88. Logan v. United States, 144 U.S. 263, 284 (1892). This principle was reaffirmed in Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944).

89. *Logan*, 144 U.S. at 284 (emphasis added).

90. *See* Youngberg v. Romeo, 457 U.S. 307, 324 (1982) (holding state has duty to provide reasonable safety for residents and personnel of institution).

91. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989), left open the question of whether a "special relationship" duty of care exists between the state and foster children placed in the state's custody in foster homes or child care institutions. *See infra* notes 92-97 and accompanying text. A number of lower courts have found that a duty of care exists in such cases. *See, e.g.*, Norfleet v. Arkansas Dep't of Human Servs., 989 F.2d 289 (8th Cir. 1993); Meader v. Cabinet for Human Resources, 902 F.2d 474 (6th Cir. 1990), *cert. denied*, 498 U.S. 867 (1990); K.H. v. Morgan, 914 F.2d 846 (7th Cir. 1990); Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987), *cert. denied sub nom.* Ledbetter v. Taylor, 489 U.S. 1065 (1989); Doe v. N.Y.S. Dep't of Soc. Servs., 709 F.2d 782 (2d Cir. 1983), *cert. denied sub nom.* Catholic Home Bureau v. Doe, 464 U.S. 864 (1983).

92. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).

93. *See id.* at 193.

94. *See id.*

95. *See id.* at 201.

exists only where the government has a special relationship with the individual.[96] Such a special relationship has been found to exist only in situations where the government has assumed custody over the individual.[97]

Thus, the Eighth Amendment's prohibition against cruel and unusual punishments and the substantive due process duty to care for and protect those within government custody are distinct constitutional requirements with different histories. The duty to provide prisoners with medical care recognized in *Estelle* is, therefore, rooted not in the Eighth Amendment, but in the Due Process Clause of the Fifth and Fourteenth Amendments. Under this analysis, *Estelle* is not about punishment and should not have been decided as an Eighth Amendment case.

The flaw in the *Estelle* opinion is that it merged these two distinct constitutional concepts and created confusion which, as discussed earlier, has continued to the present. This conclusion does not, however, invalidate all of the reasoning in *Estelle* or require that twenty years of cases that have followed and relied upon *Estelle* be discarded. Rather, it requires that courts distinguish circumstances involving punishment, and implicating the Eighth Amendment, from those that are custodial, and encompassed within the due process duty of care. Aspects of incarceration that involve *punishment* are properly evaluated under the Eighth Amendment, using an impact-based standard drawn from the *Estelle* Court's "torture or lingering death" metaphor.[98] In contrast, *custodial* aspects of incarceration should be evaluated under *Estelle's* intent-based "deliberate indifference" standard to determine whether the duty of care has been breached.[99]

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96. *See id.*

97. *See id.* The Court noted that there are only limited circumstances under which "the Constitution imposes upon the State affirmative duties of care and protection . . . to particular individuals." *Id.* at 198. These are custodial situations:

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation it has imposed on his freedom to act on his own behalf.

Id. at 199-200.

98. *See* Estelle v. Gamble, 429 U.S. 97, 103-04 (1976). As in the older Eighth Amendment cases, the critical consideration will be the severity of the actions or conditions at issue, rather than the intent of the officials. As for the content of this standard, one plausible approach was suggested by Justice Marshall in his dissenting opinion in Rhodes v. Chapman, 452 U.S. 337, 371 (1986). Justice Marshall would have used expert opinions and studies about prison conditions as the measure of acceptable societal standards. *See id.* at 371 n:4; *see also supra* notes 47-48 and accompanying text.

99. The constitutional duty of care, premised on the existence of a "special relationship," is similar to a tort duty, the breach of which is determined by analyzing the alleged tortfeasor's state of mind. It is therefore appropriate to focus upon a prison official's state of mind to determine whether

What remains is to define a workable distinction between the punitive and custodial qualities of imprisonment, a task which admittedly will often be difficult.[100] The concluding section represents an attempt to do this.

CONCLUSION

Attempting to untangle *Estelle's* threads of reasoning is not easy, for the boundaries between the Eighth Amendment's prohibition against cruel and unusual punishments and the government's substantive due process duty of custodial care are far from clear. Two trends in modern society have made it especially difficult to draw this distinction.

The first of these trends is that prisons, as they are increasingly forced to assume responsibilities and perform functions that were historically beyond their scope, are becoming more like other residential institutions. This has occurred in at least three ways. First, the high incidence of infectious and deadly diseases—particularly AIDS and tuberculosis—in impoverished communities has had a severe impact upon prison populations.[101] This has created the need for sophisticated medical and respite care within prisons.[102] Second, increasing sentence lengths

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the due process duty of care has been violated. While it might be argued that an objective standard of gross negligence, or even simple negligence, should be sufficient to establish a due process violation, the Court has required a higher showing of culpability on the part of prison officials.

The deliberate indifference test is essentially equivalent to a recklessness standard. In Farmer v. Brennan, 114 S. Ct. 1970 (1994), the Court discussed the distinction between "civil-law" and "criminal law" recklessness. The former charges the actor with constructive knowledge of an obvious, unreasonable risk, while the latter requires proof of actual knowledge. *See id.* at 1979. The Court adopted the criminal law definition in holding that "deliberate indifference" is a subjective standard. *See id.* at 1980.

100. Justice White suggested an alternative approach in his concurring opinion in Wilson v. Seiter, 501 U.S. 294, 306-11 (1991). Justice White would have distinguished between system-wide conditions and "challenges to specific acts or omissions directed at individual prisoners" and would have limited the use of an intent standard to the latter context. *Id.* at 309. However, Justice Scalia disposed of this approach by arguing persuasively that the question of when a deprivation amounts to a "condition of confinement" should not depend on the number of prisoners who are affected by the deprivation. *See id.* at 299 n.1.

101. Perhaps the most chilling measure of the extent of the AIDS epidemic in prisons is that in 1994, AIDS-related factors accounted for 35 percent of all deaths in state prisons. *See* U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, HIV IN PRISONS 1994, Table 4, "AIDS-related deaths of sentenced prisoners under State jurisdiction, 1994" (March 1996). In the Northeast 53 percent of the deaths were AIDS-related, and in Connecticut and New York, three-fifths of the deaths were AIDS-related. *See id.*

102. The prevalence of HIV has placed unprecedented demands upon prisons. *See* Kathleen Knepper, *Responsibility of Correctional Officials in Responding to the Incidence of the HIV Virus in Jails and Prisons*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 45 (Winter 1995) (recommending a comprehensive program of HIV training, education, care, and treatment); Kathy Boudin & Judy Clark, *A Community of Women Organize Themselves to Cope with the AIDS Crisis: A Case Study from Bedford Hills Correctional Facility*, 1 COLUM. J. GENDER & L. 47 (1991) (describing a program of

have yielded a "graying" prison population that requires a variety of geriatric services.[103] Third, the dramatic increase in the number of women being incarcerated has forced prisons to confront an array of parenting issues.[104] In short, prisons are being asked to take on the medical and

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peer support and counseling organized and administered by the prisoners themselves); NAT'L COMM'N ON AIDS, REP. NO. 4, HIV DISEASE IN CORRECTIONAL FACILITIES (1990) (recommending programs of prevention and treatment, recruitment of trained health care providers, clinical drug trials, family social services and reproductive counseling, and staff training on confidentiality).

The AIDS epidemic has occurred at the same time as a resurgence of tuberculosis, and in combination, the HIV and tuberculosis epidemics have created a health care crisis for prisons. *See Prevention and Control of Tuberculosis in Correctional Institutions: Recommendations, Advisory Committee for Elimination of Tuberculosis*, 262 JAMA 3258-60 (1989) (outlining a program of surveillance, containment, and assessment involving skin testing of prisoners and staff; chest radiographs; sputum smears and culture examinations; isolation of prisoners with suspected or confirmed tuberculosis in a housing area with separate ventilation, negative air pressure in relation to adjacent areas and four to six room air exchanges per hour; installation of ultraviolet lights; closely monitored administration of medication; record systems for tracking and assessing prisoners with TB; and medical training of correctional institution staff); *see also* Andrew Skolnick, *Government Issues Guidelines to Stem Rising Tuberculosis Rates in Prisons*, 262 JAMA 3249 (1989) (outlining the Center for Disease Control's recommendations for the prevention and control of tuberculosis among prison populations).

103. *See* Wilbert Rideau, *Dying in Prison, in* LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS 158-178 (Wilbert Rideau & Ron Wikberg eds., 1992); George M. Anderson, *Growing Old Behind Bars*, AMERICA, July 2, 1994, at 13-15; Judy C. Anderson & R. Daniel McGehee, *South Carolina Strives to Treat Elderly and Disabled Offenders*, CORRECTIONS TODAY, Aug. 1991, at 124, 126-27.

104. Although statistics concerning the number of prisoners who are parents of minor children are imprecise and not entirely reliable, some information is available. In 1991, 66.6 percent of the state women prisoners in the United States had at least one child under the age of eighteen, and 62.6 percent of those women had more than one child. *See* U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, SPECIAL REP., WOMEN IN PRISON, Table 9 (1991). Fifty-six point one percent of men prisoners had children under the age of eighteen. *See id.*

The profound impact of separation upon families of incarcerated parents, and particularly mothers, is illustrated by the fact that, in 1986, 85 percent of the mothers of minor children had legal custody of their children before entering prison, and 78 percent of the mothers lived with their children at that time. *See* U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, SPECIAL REP., WOMEN IN PRISON, Table 13 (1986). Furthermore, more than 85 percent of the incarcerated mothers intended to resume custody after their release from prison. *See id.* Among men, approximately one-half of the fathers of minor children had lived with their children prior to their imprisonment, and an almost equal number planned to live with their children after their release. *See id.*

A number of commentators have discussed the necessity of providing services within prisons to incarcerated parents and their children in order to preserve the family relationships. *See* McGowan & Blumenthal, *Why Punish the Children? A Study of Children of Women Prisoners*, NAT'L COUNCIL ON CRIME AND DELINQUENCY (1978). Eighteen years after its publication, this study remains the most powerful piece about the importance of the bonds between children and their incarcerated parents. The study concludes with a number of policy suggestions. *See* Adela Beckerman, *Incarcerated Mothers and Their Children in Foster Care: The Dilemma of Visitation*, 11 CHILDREN AND YOUTH SERV. REV. 175 (1989); Creasie Finney Hariston & Hess, *Family Ties: Maintaining Child-Parent Bonds is Important*, CORRECTIONS TODAY, Apr. 1989, at 102; Hale, *The Impact of Mothers' Incarceration on the Family System: Research and Recommendations*, 12 MARRIAGE AND FAM. REV. 143 (1987);

social work responsibilities traditionally borne by hospitals, nursing homes, day care centers, and social services agencies.

These changes in the role of prisons have occurred at the same time as another significant social trend: the increasing institutionalization of daily life. In the modern industrial world, daily life occurs within, and is ordered by, a variety of institutional settings, from the school to the work place. Michael Foucault described this institutional structuring as "discipline" and argued further that prison is not distinct from, but is rather on a continuum with, other disciplinary institutions.[105] A common feature of factories, offices, schools, residential child care facilities, military bases, mental hospitals, and prisons is that they all classify and regulate individuals, albeit for differing reasons and through varying degrees of coercion and behavior modification techniques.

Florence W. Kaslow, *Couples or Family Therapy for Prisoners and Their Significant Others*, 15 AM. J. FAM. THERAPY 352 (1987); Ariela Lowenstein, *Temporary Single Parenthood—The Case of Prisoners' Families*, FAM. RELATIONS, Jan. 1986, at 79, 84; Dorothy Driscoll, *Mother's Day Once a Month*, 47 CORRECTIONS TODAY 18 (1985); William H. Sack et al., *The Children of Imprisoned Parents: A Psychosocial Exploration*, 46 AM. J. ORTHOPSYCHIATRY 618, 621-27 (1976); Comment, *The Prisoner-Mother and Her Child*, 1 CAP. U. L. REV. 127 (1972).

For a comprehensive treatment of the subject of incarcerated parents and their children, *see* KATHERINE GABEL & DENISE JOHNSTON, CHILDREN OF INCARCERATED PARENTS (1995). *See also* Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. FAM. L. 757 (1991-1992).

Related to issues of parenting are questions of reproductive rights. *See* Susan Stefan, *Whose Egg Is It Anyway?: Reproductive Rights of Incarcerated, Institutionalized and Incompetent Women*, 13 NOVA L. REV. 455 (Spring 1989); Jaqueline B. Deoliveira, Note, *Marriage, Procreation and the Prisoner: Should Reproductive Alternatives Survive During Incarceration?*, 5 TOURO L. REV. 189 (1988); Mary V. Deck, Note, *Incarcerated Mothers and Their Infants: Separation or Legislation?*, 29 B.C. L. REV. 689 (May 1988).

105. *See* MICHAEL FOUCAULT, DISCIPLINE AND PUNISHMENT 137-38, 1979. Foucault described "discipline" as follows:

> [M]ethods, which made possible the meticulous control of the operations of the body, which assured the constant subjection of its forces and imposed upon them a relation of docility-utility, might be called 'disciplines.' Many disciplinary methods had long been in existence—in monasteries, armies, workshops. But in the course of the seventeenth and eighteenth centuries the disciplines became general formulas of domination. . . . The historical moment of the disciplines was the moment when an art of the human body was born, which was directed not only at the growth of its skills, nor at the intensification of its subjection, but at the formation of a relation that in the mechanism itself makes it more obedient as it becomes more useful, and conversely. What was then being formed was a policy of coercions that act upon the body, a calculated manipulation of its elements, its gestures, its behaviour. The human body was entering a machinery of power that explores it, breaks it down and rearranges it. A 'political anatomy,' which was also a 'mechanics of power,' was being born; it defined how one may have a hold over others' bodies, not only so that they may do what one wishes, but so that they may operate as one wishes, with the techniques, the speed and the efficiency that one determines.

Id.

Thus, at the same time that prisons have been forced to assume more of a "caring" role on behalf of ill and aging prisoners and those who are parents, society as a whole has become increasingly institutionalized. These two trends have increased the difficulty of distinguishing between the prohibition against cruel and unusual punishments and the duty of care: if all "disciplinary" institutions are essentially variations of a method of ordering society, then how are we to distinguish prisons from other such institutions? More to the point, how are we to differentiate between the right to be free from "punishment" that is cruel and unusual, and the duty that all institutions owe to provide some amount of protection to the individuals within them?[106]

In order to answer these questions and make these distinctions, it is necessary to determine what gives prisons their uniqueness. Those qualities that are unique to prisons are "punitive" and therefore subject to the Eighth Amendment; those attributes common to all residential institutions are "custodial" and encompassed within the duty of care.

What, then, makes an institution a prison, rather than something else? While many residential institutions have common features, the essence of a prison is the prisoner's relationship to the *cell* (and the surrounding cellblock) and the *prison guard*, for it is in the cell and through the guards that punishment is carried out by the prison and experienced by the prisoner. All residential institutions have rooms of varying levels of restrictiveness, but only prisons have *cellblocks*, i.e., space that by its very design is meant to remind a prisoner that she or he is an enemy of, and outcast from, society. Bars, open toilets which are sometimes controlled from the outside of the cell, bare bunks, tiers of cells connected by narrow catwalks, all subject to constant surveillance, bleak solitary confinement units stripped of even the most basic amenities—these are stark and constant reminders of who the prisoner is and what she or he has done. In other institutions, some attempt is made to make the residents feel that their living space is their "home,"[107] but in the prison, the cell and the

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106. What is meant here is not just the previously discussed constitutional duty of care, but a more general duty that is sometimes grounded in common law tort principles and sometimes codified, for example, in workplace safety regulations. This is the duty to protect designated classes of individuals from harm, and in some cases, to provide for their general well-being. It is the duty that employers owe to employees, schools owe to students, and mental hospitals owe to patients.

107. This is not to suggest that institutions like mental hospitals are generally cheery places. However, much of the drabness associated with such institutions has more to do with lack of resources than design. When resources are not so limited, as in a well-endowed private mental hospital, attempts are made to create a positive physical environment.

Another way to describe this idea is to conceive of what various residential institutions would choose to do if they had unlimited financial resources. While hospitals would be expected to design aesthetically pleasing physical facilities, intended to provide residents with air, light, comfort, and

cellblock cannot provide any such comfort; they must be as far removed from "home" as possible.

Similarly, while other institutions have security staff, *prison guards* are a breed apart. As is true of the cell, the role of a prison guard is to create and reinforce an atmosphere of oppressiveness.[108] One prison author has painted a graphic picture of the way in which prisoners may experience prison guards:

> The guards do not speak to you. You are *cattle* without the faculty of reason. I have been pointed in the direction of a place across the floor or the exercise cage and given a push to get me to walk there because the guards, in their contempt, will not acknowledge that a prisoner can understand reason.
>
> . . . .
>
> I have never seen an indifferent [guard]. I have seen lazy and unconcerned [guards], but *never* an objective and indifferent [guard]. The lazy ones are like magnanimous kings who carelessly overlook "slights" and arbitrarily pass out "mercies," but will, at a whim, suddenly rise up angry and take it all back, relegating everyone to hell.
>
> Always, *always* every guard in prison is a tyrant, and prisoners are his subjects.
>
> . . . .
>
> . . . Among themselves, the guards are human. Among themselves, the prisoners are human. Yet between these two the relationship is not human. *It is animal*. . . . It would seem to be an irony, but it is not: *prisoners do not make guards to be what they are*. Neither does society in general. The *state* does. It gives them *arbitrary* power over prisoners. They embrace it *as a way of life*. That is the source of their evil . . . .[109]

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privacy, one would not expect this of prisons. In fact, recent experience suggests precisely the opposite: the most expensive modern facilities are the "supermaxes," high security prisons in California, Ohio, and Colorado whose physical space seems to have been designed specifically to demoralize the prisoners by creating the bleakest and most punitive environment possible. *See, e.g.*, Craig Haney, *"Infamous Punishment": The Psychological Consequences of Isolation*, NAT'L PRISON PROJECT J., at 3 (Spring 1993) (discussing the Pelican Bay State Prison in California).

108. A qualification must be made here. The above comments are not meant to describe the *persons who become guards*, but, rather, the institutional *role* these individuals assume as guards. This distinction is made most vividly in the infamous "Zimbardo Experiment" in which "normal" volunteer male college students were randomly divided into the roles of prisoner and guard in a simulated prison. *See* Craig Haney et al., "Interpersonal Dynamics in a Simulated Prison," INT'L J. OF CRIMINOLOGY AND PENOLOGY, 69-97 (1973) (describing the experiment in detail). Within only a few days, the "guards" began to exhibit aggressive and sadistic behavior toward the "prisoners." *See id.* at 93-94.

109. JACK HENRY ABBOT, IN THE BELLY OF THE BEAST: LETTERS FROM PRISON 55-61 (1991). Throughout the book Abbott uses the term "pig" to describe guards. *See id.*

No other institution can replicate this profoundly intense relationship of prisoner to guard.[110]

If, then, the cellblock and the prison guard are seen as the distinguishing features of prison, it is these features, and the relationship of the prisoner to them, that define "punishment" for Eighth Amendment purposes. Under this approach, issues actionable under the Eighth Amendment would include overcrowding or, at the other extreme, severe isolation and accompanying deprivations of basic necessities such as food and light, as well as allegations of guard brutality and similar misconduct.[111]

As discussed above, such Eighth Amendment cases would be decided under a test focusing upon the impact of the conditions at issue upon the prisoner. Intent would be irrelevant; deplorable physical conditions could not be excused on fiscal grounds or good faith defenses. Similarly, in cases involving allegations of guard brutality, the inquiry would center on the way the guard's conduct was experienced by the prisoner; actual intent would no longer have to be proven.[112]

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110. As with cells, the distinctively punitive quality of prison guards can be seen by imagining how different institutions might behave if they had unlimited resources. Where one would expect mental hospitals to recruit individuals with specialized mental health training and sensitivity to the needs of patients, and foster care facilities to hire credentialed social work professionals, it is doubtful that prisons would alter the profile of their guards by, for example, bringing in individuals with criminology degrees and a commitment to rehabilitative goals.

111. This analysis would eliminate the distinction in Bell v. Wolfish, 441 U.S. 520 (1979), between pre-trial jail detention and post-conviction prison confinement. Because jails share the essential attributes of prisons, many jail conditions are "punitive" rather than "custodial." Jail conditions relating to cellblock conditions and guard brutality would, therefore, be evaluated under the Eighth Amendment, using an impact-based standard.

Although this would be a departure from the pre-conviction/post-conviction distinction underlying *Bell*, there is no logical reason to treat jails and prisons differently. As Justice Marshall argued in his *Bell* dissent, "in terms of the nature of the imposition and the impact on detainees, pretrial incarceration . . . is essentially indistinguishable from punishment [by imprisonment]." *Id.* at 569 (Marshall, J., dissenting). In their physical design and staffing, prisons and jails are virtually identical. Moreover, most jails currently house a mixed population comprising both pre-trial detainees and individuals who have been convicted of crimes. This latter group includes individuals serving misdemeanor time, those convicted of felonies who are awaiting transportation to prisons, and parole violators. Indeed, pre-trial detainees currently account for only slightly more than half of the national jail population. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, Table 6.15, "Conviction Status of Adult Jail Inmates" (1994).

112. The key consideration would be the felt purpose of the guard's actions. This is a subtle, but significant variation of the *Whitley/Hudson* approach. *See supra* notes 52-56 and accompanyng text. In *Hudson*, Justice O'Connor justified a *per se* rule in which all sadistic and malicious guard conduct is unconstitutional regardless of the harm the prisoner has actually suffered by asserting that "society" finds such conduct intolerable in and of itself. *See* Hudson v. McMillian, 503 U.S. 1, 8-9 (1992). One can agree with this reasoning, but see the conduct as an issue not of *intent*, but of *impact*. Sadistic and malicious guard conduct does not occur in a vacuum; it has to be experienced by the prisoner. What, therefore, gives the conduct its unconstitutional quality is not the guard's state of

Other types of prison condition cases would be governed by the duty of custodial care. Issues of medical care and physical safety, which arise in all government-run residential institutions, would not be evaluated as punishment under the Eighth Amendment, but would instead be analyzed as substantive due process claims. The test for evaluating such cases would be the primarily intent-based "deliberate indifference" standard, which, as discussed earlier, is appropriate in such contexts. Whether medical care is adequate will depend in large part on what information the medical staff had before it and what actions the staff took in response. Similarly, allegations that the prison staff has failed to adequately protect a prisoner from assault by another prisoner cannot be meaningfully assessed without first determining what the prison staff knew about the potential danger to the assaulted prisoner. Admittedly, not all cases arising in the prison setting will divide neatly into the categories suggested above: on the one hand, cases involving cellblock conditions and guard brutality as "punishment" to be evaluated under the Eighth Amendment, and on the other hand, cases involving issues such as inadequate medical care and failure to protect from assault as "custodial" claims to be decided under the duty of care. However, on a practical level, this approach would, at the very least, provide a workable distinction between cases involving overcrowding and those involving a denial of medical care, two of the most frequently litigated types of prison cases.

Estelle v. Gamble was a pathbreaking, if flawed, case that held out two promises: to give the Eighth Amendment meaning and vitality for modern prisoners; and to take an expansive and humane view of the government's duty to those who are within its custody and, therefore, completely dependent upon it for all of their basic needs. Only by revisiting *Estelle* and clarifying its historical and analytical underpinnings can these promises be given effect.

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mind, but the way in which the prisoner experiences the guard's behavior when the guard is acting maliciously and sadistically. That experience *is* harmful, even in the absence of serious physical injuries, and it is for that reason that no additional showing of physical injury is required.

This view of guard misconduct as being especially reprehensible to society is similar to the analysis used by the Court in Monroe v. Pape, 365 U.S. 167 (1961). There, the plaintiffs were found to have a constitutional cause of action for police misconduct, *in addition to* existing state tort remedies. *See id.* at 192. The principle underlying the Court's holding is that a citizen experiences a special degree of harm when the harm results from the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Id.* at 184 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)) (internal quotation marks omitted). A citizen's experience of such misconduct is much worse than that of similar misconduct on the part of another private citizen. *See Monroe*, 365 U.S. at 193-96 (Harlan, J., concurring).

This is one rationale offered to justify the imposition of enhanced criminal sanctions for bias-related crimes.